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IN THE
Supreme Court of the United States

October Term, 1982

FRANK F. COLACURCIO,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. When a defendant is charged with conspiracy to defraud the United States under 18 U.S.C. § 371 and aiding preparation of materially false and fraudulent *corporate* tax returns under 26 U.S.C. § 7206(2), both requiring a showing of specific intent, *and when there are no allegations of tax evasion either by the corporations or the individual* involved, did the United States District Court err by excluding from evidence as irrelevant: (a) copies of defendant's personal tax returns offered to show he reported the money *he* received from the corporations on his own tax returns to prove he did not intend to defraud the United States or willfully aid preparation of fraudulent corporate tax returns; (b) testimony by two witnesses that defendant instructed them to keep careful records of money received by defendant from the corporations to prove defendant did not intend to impair or obstruct the functioning of the Department of Treasury; (c) testimony by the preparer of defendant's personal returns that defendant instructed her to report on his personal returns income received from the corporations to prove defendant did not intend to defraud the United States or aid preparation of fraudulent returns; (d) testimony by a Certified Public Accountant and former Internal Revenue Service agent that if defendant had a secret ownership interest in the businesses owned by the corporations as alleged by the government, nevertheless the *corporate* returns correctly omitted defendant's share of the earnings which were properly reported on the *personal* returns?

2. When a criminal defendant is charged with conspiracy, and the entire indictment is sent to the jury, is it error for the trial judge to tell the jury in a supplemental instruction that the jury "need not be concerned with the manner and means described in the indictment"?

3. In the face of conflicting decisions between various circuits of the United States Court of Appeals as to whether, and under what circumstances, a trial court is obligated to grant immunity to defense witnesses, are a defendant's constitutional rights to due process and compulsory process violated when: (a) the Assistant United States Attorney obtains immunity for a witness before the grand jury; (b) the

government and defense subpoena the witness to testify at trial; (c) the Assistant United States Attorney obtains written authorization from the Department of Justice to make application for immunity again for the witness at trial; (d) during the course of a pretrial interview the Assistant United States Attorney threatens the witness with perjury prosecution if she persists in telling the same story at trial as she gave to the grand jury; (e) the government elects not to call the witness in its case; (f) when called by the defense the witness then asserts her fifth amendment privilege before the court; and (g) the Assistant United States Attorney refuses to make application for immunity to the court, denying the defense the witnesses' exculpatory testimony?

PARTIES TO PROCEEDING IN COURT BELOW

Petitioner Frank F. Colacurcio and Kent D. Chisman were charged by the United States of America and tried together under a multiple-count indictment. Both defendants were separately represented and their appeals were consolidated. Petitioner Colacurcio separately petitions this Court for a writ of certiorari.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Frank F. Colacurcio respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 28, 1982.

OPINION BELOW

The memorandum opinion of the Ninth Circuit Court of Appeals was unpublished but is reproduced in Appendix A. An order amending the opinion is reproduced in Appendix B. The panel rendering the opinion consisted of Circuit Judges Kilkenny, Hug and Skopil.

JURISDICTION

The opinion below was filed on April 28, 1982. A timely Petition For Rehearing and Suggestion of Appropriateness

of Rehearing en Banc was denied on July 2, 1982. (Appendix E) This Petition for Certiorari is filed within sixty days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are amendments V and VI to the United States Constitution. The United States statutes involved are 26 U.S.C. § 7206(2) (aiding preparation of false corporate tax returns) and 18 U.S.C. § 371 (conspiracy to defraud the United States). The pertinent text of the provisions involved are as follows:

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself. nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

26 U.S.C. § 7206(2)

> Any person who— . . . (2) *Aid or assistance.*—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . . shall be

guilty of a felony and, upon conviction thereof; . . . shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

18 U.S.C. § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 6003

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Frank F. Colacurcio and Kent D. Chisman were charged in a five-count indictment. (Appendix D) Count I charged both defendants with conspiracy to defraud the United States by underreporting gross receipts on corporate tax returns, Counts II and IV charged petitioner Colacurcio with aiding and abetting the filing of fraudulent or materially

false corporate tax returns for tax years ending March 31, 1978 and 1979, and Counts II and V charged Kent Chisman with filing of fraudulent or materially false corporate tax returns for the same tax years.

Trial lasted from January 12, 1981 to February 5, 1981 before Judge Donald S. Voorhees of the United States District Court for the Western District of Washington at Seattle (sitting in Portland, Oregon per a change of venue). Defendants were convicted on all counts and petitioner was sentenced to serve four years and fined $10,000 on Count I, sentenced to three years and fined $5,000 on Count II, and sentenced to three years and fined $5,000 on Count IV. (Judgment and Commitment, Appendix C) The sentences on Counts I and II run concurrently and the sentence on Count IV was suspended and petitioner placed on probation for a five-year period upon release from imprisonment imposed on Counts I and II.

The Court of Appeals affirmed petitioner's convictions on all counts.

B. Relevant Facts

In 1975 co-defendant Kent D. Chisman formed a corporation, Reeb, Inc., to acquire and operate a tavern known as the Bavarian Gardens located in Factoria, a Seattle suburb. (RT 3966-67, Ex. 186, 92) In 1977, Mr. Chisman formed a second corporation called Federal Way Tavern Corporation to acquire and operate the Brass Tiger Tavern located in Federal Way, also near Seattle. (RT 4054-4072, Ex. 186, 107(a)) The Bavarian Gardens and Brass Tiger taverns featured topless entertainment. Long before Chisman ever got into the business several Seattle-area taverns providing such entertainment formed the Cabaret Association of Topless Dancing and successfully defeated an initiative to prohibit such entertainment in King County, Washington. (RT 3054-3059) All of the so-called "topless" taverns had a common problem of getting and keeping a reliable supply of dancers and other employees and an organization grew out of the Cabaret Association called Talents West. (RT 3055-56) Talents West received $500 a month from each tavern and, in return, acted as an employment agency, furnishing dancers and other employees,

such as doormen, bartenders, and managers, as needed. (RT 2145, 3193-96) Talents West was operated by petitioner during the years covered by the indictment. Colacurcio was recognized as an expert in the management of topless taverns. (RT 3085, 3171, 3431) Kent Chisman began utilizing the services of Talents West soon after getting into the topless tavern business. (RT 3976-78, 3981-83) Mr. Chisman, who had never before owned or operated a tavern, began relying on petitioner more and more to handle his management problems. (RT 3982-83) This freed Chisman to remain active in his other business ventures. In return for the help, Chisman paid Colacurcio several hundred dollars a week. (RT 3983, 4000-02)

The charge against the defendants was basically that they had "skimmed" amounts (including the Colacurcio management payments) from the gross receipts of the taverns. The "skimming" was described in the Manner and Means allegations of the indictment as follows:

Manner and Means

1. It was part of the conspiracy that Frank F. Colacurcio would hide his ownership interest in the Bavarian Gardens and Brass Tiger by having Kent D. Chisman appear as the sole stockholder of Reeb, Inc. and Federal Way Tavern Corporation on filings with the Washington State Liquor Control Board.

5. It was part of the conspiracy that Frank F. Colacurcio and Kent D. Chisman would remove some of the gross receipts of the Bavarian Gardens and the Brass Tiger and retain or distribute the receipts without accounting for the money.

6. It was part of the conspiracy that Frank F. Colacurcio and Kent D. Chisman would prepare new accounting forms reflecting lower gross receipts for the Bavarian Gardens and the Brass Tiger, and forward these altered forms to various bookkeepers and accountants so that Federal income tax returns could be prepared.

8. It was part of the conspiracy that various bookkeepers and accountants would unknowingly prepare accounting records and tax returns for Reeb, Inc. and the Federal Way Tavern Corporation which were false.

> 9. It was part of the conspiracy that Kent D. Chisman would sign the tax returns as President of Reeb, Inc. and Federal Way Tavern Corporation, knowing the returns to be false.

(Appendix D).

Mr. Colacurcio had learned from previous experience with the Washington Liquor Control Board that establishments which he owned or managed could not hold liquor licenses. (RT 4124) To keep his management role a secret, even in the corporate records which are periodically audited by the Liquor Board, Colacurcio's management fees were paid in cash. Colacurcio offered to prove he honestly reported all sums paid to him by the taverns on his *personal* tax returns as "consulting income." (CP 1051, RT 434, Def. Ex. A1, A2, A3) It was his position that though his management fee was subtracted from gross revenues before they were reported on corporate tax returns for tax years 1978 and 1979, corresponding management fee deductions were not taken on the corporate returns. Consequently, there was absolutely no impact on either Colacurcio's tax liability to the government or the corporations' tax liability to the government because of the secret Colacurcio payments. (RT 4349-51) The indictment made no allegations of tax evasion against either Colacurcio personally or the corporations. It simply charged Colacurcio with aiding in the preparation of tax returns for Chisman's corporations which were materially false (the 26 U.S.C. § 7206(2) violation) in that they underreported gross revenues. It also charged Chisman and Colacurcio with having conspired to defraud the United States (the 18 U.S.C. § 371 violation). There was no evidence that Colacurcio had anything personally to do with preparation of the corporate tax returns which were alleged to have understated gross revenues. The government's entire case against him was predicated on the fact that some of the weekly cash sheets, delivered to the bookkeepers for the corporations, were in his handwriting and that on approximately 22 days during the fiscal year ending March 31, 1978 and approximately 14 days during the fiscal year ending March 31, 1979 those weekly cash reports omitted gross revenues shown by the government (by other records) to have been received on those same days.

Relying on *Ingram v. United States*, 360 U.S. 672, 677-680 (1959), petitioner argued at trial that although concealment of sums paid to him to hide his management role might violate state liquor regulations, the absence of an intent on his part to violate federal tax law was a complete defense to a charge of conspiracy to defraud the United States under 18 U.S.C. § 371 or to aid, willfully and knowingly, the preparation of fraudulent or materially false corporate returns under 26 U.S.C. § 7206(2). In addition to offering his personal returns, petitioner sought to prove he had no intent to defraud the United States, or to obstruct the Internal Revenue Service by offering testimony of several witnesses who had been instructed by him to keep careful records of all payments he received from taverns so he could prove that the payments were honestly reported on his personal returns. (RT 3378-84, 4118-20) He sought to present the testimony of the preparer of his personal returns to the effect that she was instructed to report all payments from the corporations on his personal returns. (RT 2966-68) He offered the testimony of a CPA and former IRS agent who would have testified that if Colacurcio did have a secret ownership interest in the taverns, as argued by the government, it would have been improper to report his share of the income on the corporate returns and that his share of the tavern earnings was properly reported on his own personal returns. (RT 4338-39) The court rejected all of this evidence as irrelevant and inadmissible. (RT 2962-65, 2971, 4119, 4342-43)

The government's position at trial (with which the District Court agreed) was that the exclusive issue was falsity of the returns, not actual loss to the government, tax evasion or fraudulent intent. It argued: (1) the corporate tax returns were false because gross revenues were understated; (2) petitioner contributed to the understatement of gross revenues by receiving monies which he knew were not being reported to the tavern bookkeepers. Therefore, said the government, he should not be allowed to show that he nevertheless thought the Internal Revenue Service was getting all it had coming because his efforts to do so were "irrelevant". Stated differently, the government said: "We have proof that the tax returns were incorrect. We have

proven petitioner did something that contributed to that result. We don't need to consider what he was thinking or how he was acting at the time. It would be a waste of the court's time to even let him try to explain it. His evidence as to his state of mind simply isn't relevant." The District Court's exclusion of the evidence (now affirmed by the Ninth Circuit), converts 18 U.S.C. § 371 and 26 U.S.C. § 7206(2) into "strict liability" criminal statutes. A showing of falsity of tax returns is sufficient to produce automatic guilt. No longer can a defendant charged with violation of those statutes defend himself on the issue of criminal intent or introduce evidence to explain his motive in the manner discussed by this Court in *Ingram v. United States*, 360 U.S. 672, 677-680 (1959).

The second issue raised in this petition is the propriety of a supplemental instruction given by the trial court to the jurors directing them to ignore the "manner and means" allegations and the indictment. In brief, the second superseding indictment (Appendix D) describes the specific details of the alleged conspiracy in nine "manner and means" paragraphs. Some of the critical allegations appear at pp. 5-6, *supra*.

In accordance with the agreement of all counsel, the entire indictment was sent to the jury. (RT 3911-12) During deliberation the jury sent out a written question as to the "role" of the "manner and means" portion of the indictment. (RT 4597) The court announced that it proposed to advise the jurors to *ignore that portion of the indictment*. (RT 4597-98) The defendants objected, particularly because an important aspect of their closing arguments was the failure of the government to prove the "manner and means" allegations. (RT 4598) Defendants also argued that without reference to the manner and means portion of the indictment the government could charge one conspiracy and obtain a conviction based on some entirely different conspiracy in violation of defendants' fifth and sixth amendment rights. (RT 4598) Attorneys for Colacurcio proposed an alternative response which was rejected. (RT 4600) The court instructed the jury to ignore the "manner and means" allegations. (Appendix D) It is petitioner's contention that the

supplemental instruction violated petitioner's fifth and sixth amendment rights. The manner and means allegations were essential factual allegations describing the skimming case charged in the indictment. For example, the government charged in paragraph 1 of the Manner and Means allegations that Colacurcio hid his ownership interest in the tavern from the Washington State Liquor Control Board. Colacurcio had argued that he had no such interest but he agreed his secret management fees were hidden from the liquor control board. Suddenly the jury was told to pay no attention to that.

It was alleged that defendants took gross receipts without accounting for them (Manner and Means paragraphs 5 and 6) and that the net result was that gross receipts were omitted from corporate tax returns and *that Chisman signed the returns knowing they were false* (Manner and Means paragraphs 8 and 9) The trial court's separate later supplemental instruction in response to a specific jury question told the jurors to pay no attention to those charges. In effect the Court said to the jury — "The government alleged it but it doesn't really have to prove it." The court's supplemental instruction constituted an impermissible amendment of the grand jury indictment.

The final issue raised involves conflicts between decisions of the United States Courts of Appeals and important unsettled questions regarding a trial court's obligation to grant witness immunity when a defense witness whose testimony is clearly exculpatory has been threatened by government counsel with a perjury prosecution and asserts her fifth amendment rights when called as a defense witness.

At trial the defense attempted to call one Pam Dougal as a defense witness. She announced that she would refuse to testify unless given a grant of immunity. (RT 3255) Her attorney advised the court that she had previously been given immunity when called by the government as a grand jury witness. (RT 3252, 3316-21) The Assistant United States Attorney refused to make application for immunity for her despite having written authorization from the Department of Justice. (Court Ex. 5, RT 3231-32) He had planned to call her himself as a prosecution witness during the government's

case in chief. (RT 3233) He had earlier obtained immunity for her as a grand jury witness. When she insisted on repeating her grand jury testimony at trial (in the course of a pretrial interview by the U.S. Attorney) he discussed the possibility of a perjury prosecution with her. (RT 3231) He decided not to call her as a witness and refused to seek immunity for her even though authorized to do so. Her refusal to testify, absent another grant of immunity, cost the defense her testimony.

The District Court *directed* the U.S. Attorney to make an application for immunity for another important defense witness (Mr. DeFeo) who was also asserting his intention to stand on his fifth amendment rights, holding that his testimony *was* essential to a full and proper defense. (RT 3364) However, the court refuse to make a similar ruling as to Ms. Dougal.

Refusal to grant Dougal immunity denied a petitioner the testimony of an indispensable defense witness, in violation of petitioner's due process rights under the fifth amendment and compulsory process rights under the sixth amendment.

REASONS FOR ALLOWING THE WRIT

A. The Decision Of The Court Of Appeals Sanctions Such A Departure From The Accepted And Usual Course Of Criminal Judicial Proceedings To Call For An Exercise Of This Court's Power Of Supervision.

"The critical element in a criminal tax case . . . is the mental state of the defendant. Courts have *repeatedly* observed that in such cases the accused as part of his defense is *entitled* to wide latitude in the introduction of evidence which tends to show lack of specific intent." *United States v. Sternstein*, 596 F.2d 528 (2d Cir. 1979) (numerous citations omitted; emphasis added). Contrary to this oft recognized and fundamental right, petitioner Colacurcio was *wholly* precluded from introducing evidence corroborative of his lack of specific intent. Most critical was the exclusion of petitioner's personal tax returns which the government argued were irrelevant. (RT 2962-65) The government took the opposite position in *United States v. Brashier*, 548 P.2d 1315 (9th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977) and

United States v. Williams, 470 F.2d 915 (2d Cir. 1972) in which the two different Courts of Appeals held tax returns other than the alleged false returns properly admissible as probative of the defendants' intent. In *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981) the court of appeals specifically commented on the defendants *failure* to report monies received from a corporation on his personal return in a case where he was charged with causing preparation of false corporate returns. Here the faithful reporting by Colacurcio of receipts from the corporations on his personal returns was held irrelevant.

The Ninth Circuit affirmed the district court's ruling here saying only: "[t]he District Court has wide discretion in determining whether evidence is relevant" in this context. (Appendix A) In a single sentence the Ninth Circuit has stripped this petitioner of a fundamental right — the right to defend himself, to explain his conduct in a way which might have persuaded the jury that he intended no wrong and to contend that even though he received the proceeds of what appeared to be a skimming operation *he* at least had no thought of cheating the Internal Revenue Service or avoiding any income taxes.

The proper approach in our criminal justice system is exemplified by cases such as *United States v. Brown*, 411 F.2d 1134, 1137 (10th Cir. 1969) (when issue is specific intent to violate 26 U.S.C. § 7206 evidence on the question of intent may take a wider range than is allowed in support of other issues) and *U.S. v. Ottley*, 509 F.2d 667, 674 (2d Cir. 1975) (although appellate courts normally will not reverse a conviction on an evidentiary ruling within the discretion of the trial court, in a criminal case where the issue is intent to defraud a defendant is entitled to introduce evidence which will corroborate the lack of intent to defraud and refusal to accord defendant that right is reversible error).

In affirming the District Court's ruling the Ninth Circuit said: "The fact that Colacurcio may have honestly paid personal taxes on unreported corporate income has no relevance to whether he willfully assisted in the falsification of a material fact by underreporting the corporate income." (Appendix A) This is simply not so. It completely ignores

this Court's opinion in *Ingram v. United States*, 360 U.S. 672 (1959) where this Court stated, "This [is] not a case where efforts at concealment would be reasonably explainable only in terms of motivation to evade taxation. Here, the criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted." *Id.* at 679. However, "if one of its objectives, even a minor one, be the evasion of federal taxes, the offense is made out, though the primary objective may be concealment of another crime." *Id.* *Ingram* stands for the simple proposition that intent to violate a state law which results in falsification of a federal tax return will not support a federal conviction without proof of intent to violate federal law. Thus, in this case petitioner had the difficult burden of proving that concealment of payments to him on the corporate tax returns (by underreporting gross revenues and not taking corresponding consulting fee deductions) was in no sense motivated by the desire to evade federal taxes, but solely to hide his involvement from the Washington State Liquor Control Board. In order to prove this petitioner sought to introduce his personal returns to prove *he* carefully paid all taxes owing on *his* corporate earnings in support of his claim that he had no intent to falsify returns and defraud the federal government. The difficulty of demonstrating that the prohibited intent played no role at all in Colacurcio's thinking made every bit of evidence tending in that direction critical. Any relevant fact not otherwise presented to the jury might trigger the reasonable doubt which prevents conviction.

Relevant evidence is "Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. The question before this Court, then, is: Would the jury of laymen have considered it less probable that Frank Colacurcio intended to defraud the United States (18 U.S.C. § 371) or willfully aided preparation of fraudulent or materially false corporate returns (26 U.S.C. § 7206(2)) if they had been allowed to hear testimony that, during the same years when the corporate returns were filed, Colacurcio filed

personal returns which honestly reported money received from the corporations? The above question can, as a matter of simple logic and fairness, only be answered in the affirmative. Denying petitioner the right to introduce evidence to corroborate his mental state completely deprived him of the right to defend himself. Judge Learned Hand in *United States v. Matot*, 146 F.2d 197 (2d Cir. 1944) categorically rejected any such draconian approach saying: "It was not fair to confine [defendant] to a bare denial — never impressive in the mouth of the accused. He was entitled to corroborate that denial by any conduct which confirmed it." *Id.* at 198-99. In *Matot* the trial court had refused to admit a conversation between a defendant and a bank official that might have negated defendant's intent to defraud the bank. Judge Hand concluded: "[i]t is always hard to say what reasonable people may deem logically material, and all doubts should be resolved in favor of admission . . . .", defendant "should have been allowed whatever advantage the testimony might have given him." *Id.* at 199.

The Ninth Circuit's opinion erroneously concludes, "The only basis for admission of the returns was the state of mind exception to the hearsay rule. Fed. R. Evid. 803(3)." (Appendix A) No hearsay objection was raised at trial but, if it had been, it would have been entirely without merit. The proffered tax returns did show Colacurcio's state of mind but they did not violate the hearsay rule. In order to be inadmissible hearsay, an out of court statement must be "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). The returns were not being offered to prove that Colacurcio's status as to the taverns was that of a "consultant", or that the correct amount of his total earnings listed as "consultant fees" was the amount shown under those categories on the returns. They were offered to prove that he *did* report to the federal government his earnings from the two taverns here involved as persuasive evidence that he did not intend to defraud the United States and did not willfully aid the preparation of fraudulent or materially false corporate returns. The excluded returns were proof of three separate *acts* by Colacurcio in three successive years which showed his state of mind as to how the amounts

he received from skimmed gross receipts should be handled for tax purposes. Is it reasonable to believe that a man who was honestly reporting and paying taxes to the United States on those amounts was attempting nevertheless to defraud the government?

It is well established that evidence of *acts* and *utterances* showing the state of mind of a defendant is not hearsay. *United States v. Cline*, 570 F.2d 731 (8th Cir. 1978) (circumstantial state of mind testimony is not hearsay). This principle is reflected in the writings of the leading authors on evidence, Professors McCormick, Wigmore and Morgan. *McCormick on Evidence* § 249 at 590 (2d Ed. 1972) (declarations which impliedly, indirectly, or inferentially indicate mental state are not hearsay); 6 Wigmore, *Evidence* § 1715 at p. 61 (3rd Ed. 1940) (circumstantial evidence of mental state is not hearsay); Morgan, *A Suggested Classification of Utterances Admissible on Res Gestae*, 31 Yale L.J. 229, 232 (1922) (circumstantial evidence of mental state is not hearsay). *See also United States v. Taglione*, 546 F.2d 194, 200-01 (5th Cir. 1977) (error to exclude testimony of defendant's former attorney as to a conversation in which defendant made statements showing his then existing state of mind and corroborating his defense of lack of intent to defraud).

The trial court's ruling as to relevancy extended beyond exclusion of the personal returns to all evidence offered as to mental state. Petitioner sought to prove he had no intent to impair, obstruct or impede the Department of Treasury by asking specific questions of two witnesses. The District Court excluded the evidence as irrelevant on both occasions. (RT 4118-20, RT 3379-84) First, Kent Chisman would have testified that in connection with the secret consulting fees paid by the two taverns, Colacurcio instructed him to keep accurate records of compensation paid to Colacurcio in case later proof was necessary. (RT 4118-20) In addition, another witness, Philip McKibben, would have testified that in connection with a similar compensation arrangement for a different tavern, defendant Colacurcio admonished McKibben to keep accurate records of the amounts paid to him. (RT 3378-80) Even the government expressly conceded at trial on several occasions that the offered McKibben

testimony was relevant. (RT 3370, 3349, 3251 (Assistant U.S. Attorney Sim: "I think that area is relevant. . . ."; "I think it is relevant evidence. . . ."')) These acts are totally inconsistent with the government's claim that the agreement between defendants had as its purpose "impairing, obstructing or impeding" the Internal Revenue Service. Both witnesses' testimony would have shown that petitioner had no such purpose.

This is especially clear when the nature of the supposed obstruction is considered. The government argued below that it needed only to prove petitioner intended to deprive the government of the ability to properly review and audit the tax affairs of Reeb, Inc. or Federal Way Tavern Corporation to establish a violation of 18 U.S.C. § 371. The government in essence was claiming that a man who honestly paid his own taxes, and who told those who paid him to keep accurate records so he could prove the amounts of the payments he received, nevertheless concealed the amounts of those payments to frustrate any IRS auditor who might review the returns of Chisman's businesses. This argument strains credulity. Evidence of defendant Colacurcio's concern with making accurate records regarding his consult[illegible] fees from the very taverns in question went to the heart of and was directly relevant to the issue of whether defendant intended to impair the IRS's ability to function.

The offered evidence was also plainly relevant on the issue whether defendant Colacurcio *willfully* aided the preparation of fraudulent returns under 26 U.S.C. § 7206(2). Defendant Colacurcio's actions in seeking to insure he could prove the amounts of payments made to him tend to show his complete good faith with respect to the federal taxing authorities. His instructions to keep careful records as to the money he received make it less likely that he believed omissions of those payments from gross revenues reported on the corporate returns at issue were material. The relevance of his conclusions in that regard was demonstrated by the testimony of Mr. Paul Garrett, CPA and former IRS agent, (which *was* admitted) to the effect that taking Colacurcio's consulting fees "off the top" and failing to claim a legitimate deduction for them produced no net tax loss to the United States. (RT 4351)

The trial court also excluded as irrelevant offered testimony of Ethel Fitzpatrick, the preparer of petitioner's tax returns, who would have testified that petitioner, as a matter of consistent practice, gave her written information about his consulting fee income from taverns. (RT 2966-2971) She would also have testified that he consistently told her he could not show the names of the taverns from which he received fees on his tax returns because the Liquor Control Board would revoke the licenses. (RT 2966) The trial court wrongfully excluded this evidence as irrelevant and the Ninth Circuit agreed. Colacurcio's established practice in honestly reporting such payments, and in keeping a written record of them even though they were received in cash, is totally inconsistent with the government's theory that he entered into an agreement whose purpose was to "impair, obstruct or impede" the Internal Revenue Service. Ethel Fitzpatrick's testimony would have shown defendant had no such purpose. Ms. Fitzpatrick's testimony was also relevant to whether petitioner *willfully* aided preparation of a fraudulent return under 26 U.S.C. § 7206(2). Her testimony would have shown his conduct was that of a taxpayer attempting to comply with the tax laws as to large cash payments, not trying to circumvent them. Recordkeeping is the antithesis of the defrauder's way. Ethel Fitzpatrick's testimony was relevant to show petitioner's good faith efforts to accurately report to federal tax authorities and made less probable the charge that defendant willfully aided preparation of false corporate returns.

Finally we seek review of the exclusion of certain expert testimony offered by petitioner. In the indictment the government accused Colacurcio of having a secret ownership interest in the taverns. (Manner and Means paragraph 1, Appendix D) An Assistant U.S. Attorney told the jurors in opening statement: "The evidence will show you that Frank Colacurcio was in fact a secret or silent partner or perhaps the full owner of both of these taverns." (RT 373) Colacurcio steadfastly maintained he owned no interest in the taverns. Nevertheless, Colacurcio felt compelled to offer testimony of the tax consequences if the jury concluded he *did* possess an ownership interest as charged by the government. The testimony of Paul Garrett, a Certified Public Accountant and

former Internal Revenue Service agent would have established that if Colacurcio was a joint venturer with the corporations in the tavern businesses his share of the earnings should have been excluded from the corporate returns and properly belonged on his personal returns. (RT 4337-4343) The government, however, objected to the offered expert testimony, arguing that the assumption that the form of the alleged undisclosed ownership interest, was a "joint venture" or partnership with Kent Chisman's corporations, was not supported by the evidence. The trial court excluded the opinion. In short, the government, after making the allegation, objected to a defense expert opinion based on the government's own charges. The record was clear that Kent Chisman had personally made the financial investment to acquire both taverns and had formed separate corporations to acquire each tavern. (RT 3971-72, 4072, 3696, Ex. 92) It was uncontroverted that the corporate entities were the legal owners of each tavern and that Kent Chisman was the sole shareholder of each corporation. (Ex. 186, RT 4072) If Colacurcio had an ownership interest as charged, the only logical assumption was that Colacurcio was a silent partner or joint venturer with the corporations. This was the assumption upon which petitioner's expert was prepared to testify. This assumption was supported by the indictment (Appendix D) and the government's opening statement. (RT 373) There could be no error more clearly erroneous than to deny petitioner the opportunity to prove the tax consequences of the government's charge. *See United States v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979).

The exclusion of evidence outlined above was not a matter of incidental concern or harmless error. It effectively removed *mens rea* as an element of the criminal offenses charged. No other evidence was admitted on any of the points which cured the exclusions. The court's rulings effectively denied petitioner the opportunity to defend himself based on his mental state. Because the critical element in a criminal tax case is the mental state of the defendant courts have repeatedly observed that in such cases the accused is entitled to wide latitude in the introduction of evidence which tends to show lack of specific intent. Excluding all evidence as to

mens rea is a gross departure from the accepted and usual course of criminal judicial proceedings. This Court should exercise its power of supervision and review the actions of the lower courts.

B. In Sanctioning The Trial Court's Instruction To The Jury To Ignore The Manner And Means Portion Of The Indictment, The Court Of Appeals Decided An Important Question Of Federal Law In Conflict With Applicable Decisions Of This Court.

After commencing deliberations, the jury sent these written questions to the court:

> What role do the manner and Means described in the indictment play in our consideration of the elements of Count I mentioned in Judge's Instruction No. 9? Why are the Manner and Means in the indictment?

(RT 4597) The court advised counsel that it proposed to give the jury the following response:

> In response to your inquiry, in considering Count I of the indictment *you need not be concerned with the Manner and Means described in the indictment.* They are in the indictment because procedurally they must be in the indictment. In determining the guilt or innocence of the defendants to Count I, you should direct your attention to the elements of the crime as set forth in the Court's Instruction No. 9 rather than tothe Manner and Means section of the indictment.

(Emphasis supplied.) (RT 4597-98) Instruction No. 9, to which the jury's attention was directed, was as follows:

> In order to establish that either of the defendants committed the crime charged in Count I of the indictment, the government must prove beyond a reasonable doubt each of the following elements as to that defendant: 1. That beginning sometime prior to April 1977, and continuing through at least 1979, the defendants willfully entered into a conspiracy. 2. That the conspiracy had as its objective either
>
> (a) to cheat the United States, or any one of its agencies, out of money or property
>
> or
>
> (b) to impede, impair, obstruct or defeat the lawful functions of the Department of the Treasury in the collection of revenue by willfully filing Federal income tax returns for Reeb, Inc., and the Federal Way Tavern

> Corporation, which substantially understated the gross receipts generated by the Bavarian Gardens and by the Brass Tiger.
>
> 3. That the defendant in question willfully became a member of that conspiracy with the intent to further its objective. 4. That during the existence of the conspiracy one of the defendants knowingly committed within the Western District of Washington at least one overt act in furtherance of the objective of the conspiracy.

(RT 4395-96)

Counsel for petitioner objected to the court's proposed response on the grounds that the indictment had been provided to the jury by agreement of all parties (RT 3911, 3912), argument had been based on the failure of the government to prove the manner and means allegations (RT 4598), and the Government had to prove the particular conspiracy alleged in the indictment and not some other conspiracy (RT 4598). Defense counsel proposed the following response to the jury's questions:

> The Manner and Means allegations are in the indictment for procedural reasons. The Government must prove the conspiracy it has pleaded; not some other conspiracy, and you may not find the defendants guilty of some conspiracy other than that pleaded. You should also consider the elements of the offense under Count I as given to you in the Court's Instruction No. 9.

The court refused the defense's proposed response and gave its own response quoted above to the jury's questions. (RT 4600) In instructing the jury that it *need not consider* the manner and means allegations and need only look at the elements of the crime as set forth in Instruction No. 9, the district court committed reversible error.

To be constitutionally sufficient, an indictment must contain the elements of the offense charged and sufficiently apprise the defendant of the charge against which he must defend. It must be so specific as to enable him to plead double jeopardy in a subsequent prosecution. *Hagner v. United States*, 285 U.S. 427, 431 (1932). An indictment drawn in the language of the statute is not sufficient "unless those words, in and of themselves, fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

United States v. Carll, 105 U.S. 611, 612 (1882). If the statute defines the offense in generic terms only, the indictment "must state the species, — it must descend to particulars." *United States v. Cruikshank*, 92 U.S. 542, 558 (1876). "Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *United States v. Hess*, 124 U.S. 483, 487 (1888).

These basic principles of fundamental fairness have retained their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure. *Russell v. United States*, 369 U.S. 749 (1962); *United States v. Nance*, 533 F.2d 699 (D.C. Cir. 1976). These principles are fully applicable to indictments under 18 U.S.C. § 371, the general conspiracy statute. *See, e.g., United States v. Rosenblatt*, 554 F.2d 36 (2d Cir. 1977); *United States v. Giese*, 597 F.2d 1170 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979). Moreover, an indictment charging a conspiracy "under the broad language of the general conspiracy statute must be scrutinized carefully" because of its potential for abuse. *Dennis v. United States*, 384 U.S. 855, 861 (1966); *United States v. Shoup*, 608 F.2d 950, 955 (3d Cir. 1979).

In general, the indictment must allege the elements which are the gist of the offense: the agreement, the object to be accomplished, and an overt act in furtherance of the agreement. *United States v. Giese, supra*, at 1177. Because the gist of the offense is the agreement, it is essential to determine what kind of agreement existed. *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). Although it is unnecessary to allege and prove all the details or specifics of the agreement, *United States v. Gleason*, 616 F.2d 2 (2d Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980), the "essential nature of the plan" must be shown. *Blumental v. United States*, 332 U.S. 539, 557 (1947).

The "essential nature of the plan" is not shown by allegations simply in the language of 18 U.S.C. § 371. Since "[b]oth clauses of the conspiracy statute use broad, generic terms which are insufficient, standing alone, to define the

'essential nature' of a given conspiratorial plan," *United States v. Rosenblatt*, 554 F.2d 36, 41 (2d Cir. 1977), a conspiracy to defraud indictment must "descend to particulars." *The particulars to which this indictment descended were the allegations in the nine paragraphs captioned "Manner and Means" and nowhere else.*

Here the *gist* of the offense was skimming, the omission of certain gross receipts from the corporate tax returns and the *willful* filing of those returns by Chisman, knowing they were false. The only portion of the indictment which descended to particulars and contained those specific allegations were the Manner and Means paragraphs. Those were the paragraphs which the District Court told the jurors they "need not be concerned with."

It is hornbook law that the Government must prove the allegations of the indictment necessary and material to describe the offense charged. *3 Wharton's Criminal Procedure* § 504 (1974). This requirement stems from the fundamental principles of the sixth amendment previously discussed. The Government need not prove allegations which are mere surplusage or are not an element of the offense. *Id.* § 505; *United States v. Brown*, 604 F.2d 557 (8th Cir. 1979). However, "[w]ords that are employed in an indictment that are descriptive of that which is legally essential to the charge in the indictment cannot be striken out as surplusage." *United States v. Root*, 366 F.2d 377, 381 (9th Cir. 1966), *cert. denied*, 386 U.S. 912 (1967). The allegations concerning manner and means were "descriptive of that which [was] legally essential to the charge in the indictment. . . ." *Id.* The Government had to prove that the defendant entered the particular conspiracy described and that at least one of the alleged means was used. *United States v. Gleason, supra*, 616 F.2d at 17.

To convict either defendant the jury had to "'find that he was a member of the conspiracy charged in the indictment and not some other conspiracy.'" *United States v. Cambindo Valencia*, 609 F.2d 603 (2d Cir. 1979), *cert. denied*, 446 U.S. 940 (1980), *quoting, United States v. Tramunti*, 513 F.2d 1087 (2d Cir. 1975), *cert. denied*, 423 U.S. 832 (1975). By instructing the jury that they *need not be concerned with the manner and means allegations*, the trial court removed

from their consideration the essential element of the Government's case. There is now no way to conclude that the jury determined that the conspiratorial agreement or any single element of it, as charged in the indictment, was proven.

Ever since *Ex parte Bain*, 121 U.S. 1 (1887), it has been the rule that an indictment may not be amended except by the grand jury itself. In that case the trial court ordered certain specific allegations be stricken from the indictment. The result was to allow the defendant to be convicted without proof of those allegations. In holding that this could not be done, this Court stated that it is not for the court to say whether the grand jury would have returned the indictment without the language at issue. *See also Stirone v. United States*, 361 U.S. 212 (1960) (the court may not by any means alter the material and essential nature of an indictment).

The court of appeals for the Ninth Circuit held the trial court's instruction proper on the theory that a trial court may strike allegations in a conspiracy indictment which are "non essential elements of the government's proof" citing *United States v. Lyman*, 592 F.2d 496, 500-01 (9th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979)

We have no quarrel with the proposition that non-essential allegations in a conspiracy indictment may be stricken. However, that is not what happened here. The crux of the alleged scheme to defraud the government alleged in the conspiracy count was skimming (Manner and Means paragraph 5), preparation of accounting forms which omitted the skimmed amounts and submission of those forms to bookkeepers so false tax returns could be prepared (Manner and Means paragraph 6), and final consummation of the fraud by Chisman filing the tax returns knowing they were false (Manner and Means paragraph 9). All of the above allegations were in effect stricken when the jury was told to pay no attention to them. Nothing remained of the basic factual allegations on which the charge of fraud on the United States could be based. In the language of *Ex parte Bain*:

> After the indictment was changed it was no longer the indictment of the grand jury. Any other doctrine would place the rights of the citizen which were intended to be protected at the mercy of the court or prosecuting attorney. . . .

121 U.S. at 13.

In short the trial court's instruction to the jury resulted in a material alteration of the offense charged in violation of defendant's fifth amendment rights. The jury was allowed to convict defendants of a "conspiracy" which no longer had any parameters or defined elements. The court should not have substituted its judgment for that of the grand jury. In sanctioning the trial court's instructions to the jury to ignore the manner and means portion of the indictment, the Court of Appeals decided an important question of federal law in conflict with applicable decisions of this Court. A writ of certiorari to the United States Court of Appeals for the Ninth Circuit should issue.

C. This Court Should Finally Resolve Numerous Conflicting Decisions Of The Courts Of Appeals As To Whether And Under What Circumstances A Trial Court Is Obligated To Grant Immunity To Defense Witnesses Under The Due Process Clause Of The Fifth Amendment And The Compulsory Process Clause Of The Sixth Amendment.

Whether, and under what circumstances, a trial court is obligated to grant immunity to defense witnesses under the due process clause of the fifth amendment and the compulsory process clause of the sixth amendment is an important federal question which has generated numerous conflicting decisions in the courts of appeals and which has not been addressed by this Court. The origin of this issue can be traced to a footnote written by then Circuit Judge Burger in *Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967). In footnote 1 to that case Chief Justice Burger recognized that when the government secures testimony from one witness by granting him immunity while declining to seek immunity for a witness whose testimony is favorable to the defense, arguments could be advanced that due process prohibits the government from using the immunity statute for its advantage unless the same mechanism is available to the accused. *Id.* at 534 n.1. A multitude of conflicting decisions has arisen in the circuit courts of appeals since Chief Justice Burger raised the issue, and this Court has not heretofore granted certiorari to finally resolve the conflict. Because this case presents a factual

situation common with many of the conflicting decisions it presents a perfect opportunity for the Court to finally decide this issue.

The status of the law in the circuits is discussed at length in several opinions. In *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981) the Second Circuit held that the sixth amendment does not authorize judicial grants of defense witness immunity. Nor said the court does the due process clause of the fifth amendment apply:

> [w]ithout precluding the possibility of some circumstances not now anticipated, we simply do not find in the due process clause a general requirement that defense witness immunity must be ordered whenever it seems fair to grant it.

Id. at 777.

In contrast the United States Court of Appeals for the Third Circuit in *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980) concluded that judicial immunity must be granted when immunity is properly sought in the district court, the defense witness is available to testify, the proffered testimony is clearly exculpatory, the testimony is essential, and there is no strong countervailing governmental interest. *Id.* at 972.

The United States Court of Appeals for the Ninth Circuit applies yet a different standard: "We have defined the question, however, as whether the defendant 'was denied a fair trial because of the government's refusal to seek immunity for defense witnesses.'" *United States v. Garner*, 663 F.2d 834 (9th Cir. 1981), *cert. denied*, U.S. , 102 S.Ct. 750, 72 L.Ed. 2d 161 (1982), quoting, *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976).

While this Court has not directly passed judgment on this issue, there is strong Supreme Court precedent for a judicial order that the government obtain immunity for defense witnesses. Judicially created use immunity premised on constitutional considerations was fashioned by this Court in *Simmons v. United States*, 390 U.S. 377 (1968) (defendant's testimony at suppression hearing barred from use at trial). This Court recently balanced the concern for separation of powers versus the right to production of evidence at a criminal trial and declared, "[t]he right to the

production of all evidence at a criminal trial . . . has constitutional dimensions. . . . It is the manifest duty of the courts to vindicate [the fifth amendment and sixth amendment] guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced." *United States v. Nixon*, 418 U.S. 683, 711 (1974). The Court expressed a flexible interpretation of the separation of powers doctrine and a willingness to balance competing constitutional interest and protect those individual rights endangered by the activities of another branch.

Protection of a defendant's constitutional rights by requiring immunization of defense witnesses falls clearly within the recent strong line of decisions by this Court guaranteeing defendants' access to evidence in their favor. That line of cases includes *Davis v. Alaska*, 415 U.S. 308 (1974); *United States v. Nixon, supra; Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. United States*, 388 U.S. 14 (1967); and *Brady v. Maryland*, 373 U.S. 83 (1963).

In *Davis* this Court held the defendant's confrontation right under the sixth amendment to gain impeachment testimony outweighed the state's and witnesses' interest in privacy of juvenile offender records. In *Nixon*, a claim of executive privilege yielded to the due process need for all relevant evidence in a criminal trial. In *Chambers*, the defendant's due process right to present an effective defense was held to have been violated by state evidence rules preventing defendant from cross-examining a defense witness who had previously confessed to the same crime and from introducing other admissions of the witnesses' guilt.

Washington is particularly significant. There this Court, in striking down a statute prohibiting a participant in a crime from testifying on behalf of a co-participant, declared:

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process.

388 U.S. at 19. This Court recognized that the constitution requires more than merely "giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." *Id.* at 23. The Court squarely held that the compulsory process clause of the sixth amendment imposes certain affirmative duties on the state in securing the testimony of witnesses in defendant's behalf.

Witness immunity played a large role in this case. The government sought and obtained immunity for three witnesses whose testimony it desired in order to prosecute its case. (Witness Carlson, RT 138, 468; Witness Buck, RT 470; Witness Pauole, RT 677) Petitioner sought the exculpatory testimony of two witnesses, both of whom asserted their fifth amendment rights. (Witness DeFeo, RT 3480; Witness Dougal, RT 3258) The court ruled that petitioner would be denied due process unless the government applied for immunity for one witness, Carmen DeFeo, and the government then did so. (RT 3364) The court refused to make a similar ruling for witness Dougal.

The government did not deny that it subpoenaed witness Dougal as did the defense. (RT 3257) Nor did the government deny that the Assistant United States Attorney was authorized by letter to request a grant of immunity pursuant to 18 U.S.C. § 6003, but refused to do so. (Court Ex. 5, RT 3281-82) The government did not deny that it told Pam Dougal and her lawyer she would be called as a trial witness and granted immunity. (RT 3233) Finally the government did not deny the Assistant United States Attorney discussed a possible perjury prosecution with witness Dougal. (RT 3231)

There is no doubt that the perjury discussion with the U.S. attorney gave the witness a legitimate fear of prosecution and therefore a legitimate fifth amendment claim on that basis alone. *United States v. Wilcox*, 450 F.2d 1131 (5th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972). The threat to prosecute a witness for perjury if she repeats at trial her previous grand jury testimony is a terrible weapon, available only to the prosecution. Using it to deprive the defense of an important witness is to compound the misconduct. The government's remedy, if it believes a witness has not testified truthfully is to proceed to present its alleged perjury claim

to a second grand jury and if an indictment issues to proceed with a trial. Threats of a perjury prosecution which make an important witness unavailable to the defense because she is too frightened to testify are reprehensible.

The defense did all it could do to obtain a Dougal's testimony. It subpoenaed her, requested the government apply for immunity, and called her to formally assert her fifth amendment privilege before the judge. The witness was represented by independent counsel and, acting on the advice of her counsel, steadfastly maintained she would assert her fifth amendment privilege after stating her name and address. (RT 3252, 3316-21) The only additional step the defense could have taken would have been to have the defense witness (a close associate of petitioner for 20 years), repeatedly take the fifth amendment before the jury and possibly be held in contempt of court. No defense attorney with any judgment would initiate such a disaster in the jury's presence and government counsel cannot seriously insist that he should be forced to do so. Dougal's testimony was critical to the defense as set forth in the offer of proof contained in Appendix F.

The selective and discriminating manner in which immunity was granted in this case presents an ideal opportunity for this Court to reconcile the multitude of conflicting appellate court decisions which have arisen since *Earl v. United States, supra*, and resolve an important federal question.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

DATED this day of August, 1982.

Respectfully submitted,

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